

Transparency For Freedom

*Why Congress Must Act To Protect Free
Speech And Property Rights On the Internet*

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Thank you Chairman Bob Latta, Ranking Member Matsui, and members of the Subcommittee on Communications and Technology for inviting me to testify today.

America's founders sought to establish a Republic based on the core principles of free speech and a free press. Popular support for freedom of speech was so strong in the late 18th Century that the states would not ratify the Constitution without a Bill of Rights, establishing freedom of speech as the First Amendment. But many founders did not believe that a piece of paper granted freedom of speech. Rather, they believed that all humans were born with the right to freedom of speech, and that it was an "unalienable right." In the two centuries since, the courts have allowed only very minimal restrictions on speech to prevent immediate harm, such as through fraud or the imminent incitement of violence.

Today, a federally-funded Censorship Industrial Complex and Big Tech Internet platforms are undermining our freedom of speech.¹ Large Internet technology companies have been censoring Americans, often under pressure from U.S. government employees and contractors. Today's censorship takes myriad forms reminiscent of what George Orwell famously called "wongspeak," including the censoring of so-called "misinformation, disinformation, and malinformation" on the origins of COVID², COVID vaccines³, emails relating to Hunter Biden's business dealings⁴, climate change⁵, renewable energy⁶, fossil fuels⁷, and many other issues. "If government officials are directing or facilitating such censorship," notes George Washington University law professor Jonathan Turley, "it raises serious First Amendment questions. It is axiomatic that the government cannot do indirectly what it is prohibited from doing directly."⁸

In response, Congress must defund and dismantle the Censorship Industrial Complex to protect freedom of speech. It should immediately cut funding to the Defense Department,⁹ Department of Homeland Security, the National Science Foundation¹⁰, and any other government agency used to create tools or justifications for Internet censorship. And, to prevent the Censorship Industrial Complex from re-emerging, hydra-headed, from other government agencies or government contractors, both parties should support a bipartisan truth and reconciliation commission to root out any remaining vestiges of it in other government agencies, and understand how such a Complex was created in the first place.

While those steps are urgent, they are insufficient. Even without direct government censorship, Internet "platforms," a category that includes search

companies (e.g. Google and ChatGPT) and Internet companies (e.g. Facebook and Twitter), have been caught violating their own terms of service to censor and deplatform disfavored views and voices. Section 230 of the Communications Decency Act, which exempts Big Tech Internet companies from liability for user content, has allowed these companies to operate as monopolies. As a result, Section 230 is depriving the American people of their unalienable right to freedom of speech.

As these companies and their defenders often repeat, they are private companies, and so when government is not demanding or directing, Big Tech censorship does not violate the First Amendment. But Big Tech censorship frequently has violated the spirit of free speech intended by America's founders.

What's more, in censoring disfavored views, Big Tech frequently ends up maligning and harming people, who are then deprived by Section 230 of an opportunity to sue for harm or even appeal their treatment.

What should be done to correct the current situation?

The only guaranteed remedy to Big Tech censorship is the elimination of Section 230 liability protections. Doing so would allow individual citizens to sue Internet companies for the harm they cause but at the cost of ending Internet platforms and potentially reducing overall freedom of speech. That's because the same Internet platforms that are censoring some Americans are providing many others with a platform to share their views, however, censored and controlled. As such, we should seek an alternative allowing Internet companies to continue operating while protecting the public's unalienable right to free speech.

Congress could reduce rather than eliminate liability protections in Section 230. The law currently protects the right of Internet platforms to "restrict access to or availability of material that the provider or user considers being obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." Congress could simply remove the words "otherwise objectionable," which effectively gives Internet platforms blanket protection to censor any content. This would allow citizen-users to sue the Internet platforms that unjustly censor or deplatform them.

Such a change may improve the status quo, allowing Internet companies to secretly or openly censor users for Constitutionally protected speech. If such a change were made to Section 230, it is difficult to see how the platforms could continue to censor, deamplify, and deplatform views and users for sharing their views

on things like covid origins, covid vaccines, climate change, energy, and the war in Ukraine.

At the same time, opening up Internet companies to many more lawsuits could significantly undermine their ability to function as profitable private enterprises in providing a free speech platform. Already, in response to pressure from both Democrats and Republicans, Facebook has reduced the sharing of political content overall.¹¹ It is not hard to imagine that Internet platforms would significantly reduce overall speech to avoid lawsuits. As such, simply reducing liability protections within Section 230 appears to be an option for protecting citizens and users, but one with significant potential downsides, both for private interests and the public's interest in freedom of speech.

Many people who have considered the dilemma of protecting free speech from the government and Big Tech have proposed requiring greater transparency in content management. Already companies offer some transparency in the form of public ("interstitial") notifications that content is being censored, responses to requests from researchers and reporters, and the publishing and updating of their terms of service,

But tech companies regularly violate and/ or rewrite their terms of service in response to specific events, as occurred with "misgendering,"¹² the deplatforming of a sitting president,¹³ and the release of the emails from the hard drive of the son of another.¹⁴ Big Tech often does so secretly, as with Covid vaccine censorship,¹⁵ providing little to no information about why they have done so.¹⁶ And they rarely offer an appeals process for censored and deplatformed citizen-users.¹⁷

An existing transparency proposal before Congress would further empower and strengthen the Censorship Industrial Complex rather than eliminate it. [The Platform Accountability and Transparency Act](#) would only grant access to content moderation decisions to NSF-certified researchers, reinforcing the highly secretive, partisan, and ultimately unconstitutional network of government agencies and contractors that should instead be defunded, dismantled, and investigated immediately.¹⁸

Congress should instead simply require, first, the *reporting* of all content moderation requests and communications by government employees and contractors to Internet companies, second, *transparency* by Internet companies in changes to terms of service and content moderation decisions, and third, the mandatory granting

by Section 230 companies to censored citizens the right to receive an explanation for the action and the right to provide a reply. It's worth considering these three proposed transparency requirements in detail.

1. Government Transparency. Government officials and contractors should be required by law to disclose any and all conversations and communications with Internet platforms, both their employees and contractors, relating to censorship and content moderation. Nobody expects law enforcement agencies to disclose aspects of confidential criminal investigations done with online platforms. Those interactions should be governed by existing privacy protections starting with the requirement of law enforcement to obtain a warrant before requiring searches and seizures. But if government officials are going to ask platforms to censor individuals or disfavored content, whether relating to the war in Ukraine or vaccine side effects, they should be required to immediately report that information within hours of making such requests, in as public of a way as possible, including on a government web site and on the social platforms in question.
2. Big Tech Transparency. By law, Internet platforms should be required to immediately and publicly disclose content moderation decisions, including censoring and limiting content, temporarily suspending or deplatforming users, and changes to their terms of service. Such transparency would allow private corporations to decide how to manage content while also providing citizens and users visibility into content management decisions. This transparency would allow the debate over the content to take place in other media and, hopefully, on platforms with different content management policies and practices.
3. Right to Reply. Section 230 companies should be required by law to give censored citizen-users of their platforms the right to respond to their corporate accusers. The combination of transparency by the platforms and the response by censored citizens will bring out from behind the Silicon Curtain the substantive issues while also giving the censored

author or voice their due public voice, should they choose to defend themselves publicly. That is particularly important since public censorship comes with the stigma of being labeled a liar and/or purveyor of disinformation by some of the most powerful organs of mass communication in human history. It is no understatement to say that Facebook, Twitter and other social media platforms are capable of ruining livelihoods and lives. Such Goliaths must provide censored citizens an opportunity to use their voice.

A case can be made that Internet platforms must not be allowed to deplatform or disallow verified users. Free speech happens online, and denying a person the right to express themselves on Internet platforms violates the spirit, if not the letter, of the First Amendment. We don't allow electricity, water, and garbage collection monopolies to deprive citizens of their rights to power, water, and trash collection. A similar argument can be made that we should not allow Internet monopolies to deprive citizens of their right to free speech. The effect of deplatforming is serious. If individuals and policymakers are excluded from multiple platforms, they are effectively denied their personhood, their right to express themselves, and to make a living.

At the same time, preventing Internet companies from censoring and deplatforming content and users could constitute government overreach. It would require government oversight over private decisions to temporarily or permanently suspend (deplatform) individuals who have broken terms of service, thereby risking First Amendment protections against compelled speech.

As an alternative to mandating a guaranteed right of access, Congress should pass a nonbinding resolution stating its view that Internet platforms should not deprive access to verified users save for very rare cases and, when that occurs, such cases should be publicly disclosed immediately, with the right of reply granted. Congress should make clear that it would seriously consider new legislation if Internet platforms are unjustly depriving citizen-users of access.

After such transparency is in place, Congress may still consider other measures, such as limiting the ability of Internet companies to censor speech and deplatform users, necessary. But it will be impossible for Congress to know whether that is the case without having more visibility into Big Tech's current content

moderation. As such, I urge Congress to mandate transparency before mandating additional remedies to censorship.

We have seen such overly cozy collaborations *between* Internet companies, often facilitated by government agencies and contractors.¹⁹ Congress may also consider some steps to ban or limit content moderation conversations *between* Internet platform monopolies. Such conversations may violate existing anti-trust laws. But even if they don't, such collaborations could restrict speech even more, overly aligning the terms of service of platforms such that disfavored and alternative voices can't be heard on any major platform.

Government reporting on content moderation communications with Internet platforms will require no additional work by Internet companies and will impose a modest burden on government employees and contractors.

Internet companies should embrace transparency as it may maximize free speech protections while minimizing government regulation including reduced liability protections. Internet companies already have terms of service and create internal justifications for content moderation decisions. As such, disclosing those justifications will require little to no additional work. And, by revealing the fair application of universal rules, transparency in content moderation would increase public trust and thus, the platform's value to users and advertisers.

It is no coincidence that the same American founder who described free speech as an unalienable right also believed that protecting it would require constant vigilance. America's founders rightly recognized that lust for power would drive people to seek to deny others their freedom of speech. What they could not have imagined was the ways in which this will-to-censor would be facilitated 250 years later, by a technology as radical as the printing press. We will likely grapple for many more years with the threats that the Internet revolution, Big Tech, and the rise of the Censorship Industrial Complex pose to free speech. But we can at least now see that, in the digital age, protecting our most fundamental freedom begins with transparency.

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March 9, 2023. <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/shellenberger-testimony.pdf>

² Cristiano Lima, "Facebook no longer treating, 'man-made' Covid as a crackpot idea," *Politico*, May 26, 2021, <https://www.politico.com/amp/news/2021/05/26/facebook-ban-covid-man-made-491053>.

³ Anonymous Facebook executive, email to Andrew M. Slavett and Rob Flaherty, "[EXTERNAL] Follow up - Friday call w[redacted]," Mar 21, 2021, cited by Michael Shellenberger, Leighton Woodhouse, "Under White House Pressure, Facebook Censored Accurate Covid Vaccine Information," *Public*, Jan 12, 2023, <https://public.substack.com/p/under-white-house-pressure-facebook>.

⁴ Michael Shellenberger (@ShellenbergerMD), "1. TWITTER FILES: PART 7," Twitter thread, Dec. 19, 2022, 11:09 am, <https://twitter.com/ShellenbergerMD/status/1604871630613753856>.

⁵ Editorial Board, "Facebook admits the truth: 'Fact checks' are really just (lefty) opinion," *New York Post*, Dec. 14, 2021, <https://nypost.com/2021/12/14/facebook-admits-the-truth-fact-checks-are-really-just-lefty-opinion/>

⁶ Michael Shellenberger, "Why The Biden Admin Wants Censorship Of Renewable Energy Critics," *Public*, June 14, 2022, <https://public.substack.com/p/why-the-biden-admin-wants-censorship>

⁷ Michael Shellenberger, "Disinformation Behind Censorship Demands," *Public*, Sep. 26, 2022, <https://public.substack.com/p/disinformation-behind-censorship>

⁸ Ken Klippenstein and Lee Fang, "Truth Cops: Leaked Documents Outline DHS's Plans to Police Disinformation," *The Intercept*, Oct 31, 2022, <https://theintercept.com/2022/10/31/social-media-disinformation-dhs/>

⁹ Defense Advanced Research Projects Agency, "Social Media in Strategic Communication (SMISC) (Archived)," DARPA, accessed Mar 6, 2023, <https://www.darpa.mil/program/social-media-in-strategic-communication>

¹⁰ Mike Benz, "Biden's National Science Foundation Has Pumped Nearly \$40 Million Into Social Media Censorship Grants and Contracts," Foundation for Freedom Online, Nov 22, 2022, <https://report.foundationforfreedomonline.com/11-22-22.html>; "Colleges & Universities Getting NSF Grants for 'Mis/Disinformation,' FY2021-2022," *Imgur*, Nov 2022, <https://imgur.com/a/CJQFKHT>.

¹¹ Jeff Horwitz et al., "Facebook wanted out of politics. It was messier than anyone expected," *Wall Street Journal*, January 5, 2023. https://www.wsj.com/articles/facebook-politics-controls-zuckerberg-meta-11672929976?st=e5blf7rglyftozu&reflink=article_email_share

¹² Maeve Allsup, "Twitter Beats Suit From User Banned Over 'Misgendering' Tweets," *Bloomberg*, January 25, 2021. <https://news.bloomberglaw.com/us-law-week/twitter-beats-suit-from-user-banned-over-misgendering-tweets>

¹³ Michael Shellenberger, "Twitter Files Part 6: The Removal of President Donald Trump, January 7, Part 4," December 10, 2022. <https://twitter.com/ShellenbergerMD/status/1601720455005511680>,

¹⁴ Michael Shellenberger (@ShellenbergerMD), "1. TWITTER FILES: PART 7," Twitter thread, Dec. 19, 2022, 11:09 am, <https://twitter.com/ShellenbergerMD/status/1604871630613753856>.

¹⁵ Anonymous Facebook executive, email to Andrew M. Slavett and Rob Flaherty, "[EXTERNAL] Follow up - Friday call w[redacted]," Mar 21, 2021, cited by Michael Shellenberger, Leighton Woodhouse, "Under White House Pressure, Facebook Censored Accurate Covid Vaccine

Information," *Public*, Jan 12, 2023, <https://public.substack.com/p/under-white-house-pressure-facebook>.

¹⁶ Stossel v. Meta Platforms, Inc., U.S. District Court for the Northern District of California, San Jose Division, No. 5:21-cv-07385, Reply filed by defendant Science Feedback in support of motion to dismiss pursuant to California's anti-SLAPP statute, Mar 14, 2022, http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20220314_docket-521-cv-07385_reply-1.pdf.

¹⁷ Michael Shellenberger, "I Have Been Censored By Facebook For Telling The Truth About Climate Change And Extinctions," *Environmental Progress*, July 7, 2020, <https://environmentalprogress.org/big-news/2020/7/7/i-have-been-censored-by-facebook-for-telling-the-truth-about-climate-change-and-extinctions>.

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¹⁸ Sen. Coons, et al., "S.5339 - Platform Accountability and Transparency Act," <https://www.congress.gov/bill/117th-congress/senate-bill/5339/text#toc-ide3bbc9beee014a4f885ed86f6708f637>

¹⁹ Matt Taibbi, "Statement to Congress. The Censorship Industrial Complex: Twitter Files," March 9, 2023. <https://twitter.com/mtaibbi/status/1633830002742657027?s=20>

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